

IRELL & MANELLA LLP
Steven A. Marenberg (101033)
smarenberg@irell.com
Melissa Sedrish Rabbani (283993)
mrabbani@irell.com
1800 Avenue of the Stars, Suite 900
Los Angeles, California 90067-4276
Telephone: (310) 277-1010

FREEDMAN & TATELMAN, LLP
Bryan J. Freedman (151990)
bfreedman@ftllp.com
David M. Marmorstein (192993)
dmarmorstein@ftllp.com
1901 Avenue of the Stars, Suite 500
Los Angeles, California 90067
Telephone: (310) 201-0005

Attorneys for Defendant
United Talent Agency, LLC

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LENHOFF ENTERPRISES, INC.,) Case No. 2:15-cv-1086-BRO (FFMx)
Plaintiff,
vs.
UNITED TALENT AGENCY, INC.;)
INTERNATIONAL CREATIVE)
MANAGEMENT PARTNERS LLC;)
and DOES 1 through 5, inclusive,) DEFENDANT UNITED TALENT
Defendants.) AGENCY'S MEMORANDUM OF
Points and Authorities in
Support of Motion to
Dismiss Plaintiff's First
Amended Complaint
Date: September 21, 2015
Time: 1:30 p.m.
Courtroom: 14, Spring St. Floor
Judge: Beverly Reid O'Connell

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1 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

2 Plaintiff Lenhoff Enterprises, Inc. (“Lenhoff” or “Plaintiff”) describes itself as
 3 a “boutique” talent agency, consisting of two agents and approximately 30 clients.
 4 Lenhoff is having trouble retaining its highest-earning clients and competing
 5 effectively in the market for “scripted series television” deals. Casting about for
 6 someone else to blame for its competitive woes, Plaintiff alleges in its First
 7 Amended Complaint (“FAC”) that Defendants United Talent Agency, LLC
 8 (“UTA”) and International Creative Management Partners LLC (“ICM”) have
 9 conspired to monopolize or attempted to monopolize the scripted series television
 10 market, in violation of Section 2 of the Sherman Act, by offering to “talent”—
 11 producers, directors, actors, and others seeking employment in the entertainment
 12 industry—attractive “packaging” arrangements that reduce or eliminate the
 13 commissions these clients would otherwise owe to their agencies. Lenhoff also
 14 alleges that UTA and ICM have tortiously interfered with its contracts or
 15 prospective economic relationships and are guilty of unfair competition in violation
 16 of California state law.

17 None of these claims withstands scrutiny under Federal Rule of Civil
 18 Procedure 12(b)(6). Plaintiff’s Section 2 claim upends antitrust law and is without
 19 merit as a matter of law for several independent reasons. The FAC does *not* allege,
 20 because it cannot, that UTA alone has sufficient market power to “monopolize” any
 21 relevant market. Indeed, that pleading admits that UTA is but one of the four largest
 22 talent agencies in Los Angeles, and alleges that two agencies, William Morris
 23 Endeavor (“WME”) and Creative Artists Agency (“CAA”), have larger market
 24 shares than UTA. By Plaintiff’s own measure, UTA has a market share between 18
 25 and 23%—a share that is insufficient, as a matter of law, to either exercise
 26 monopoly power or present a dangerous probability of achieving monopoly power,
 27 as is required to prove a Section 2 violation for attempted monopolization. *See*
 28 Section IV.A.2, *infra*.

1 Implicitly recognizing this fact, Plaintiff therefore alleges that UTA has
 2 conspired with Defendant ICM and two other agencies not even named as
 3 defendants to collectively exercise monopoly power. But, it is settled antitrust law
 4 that a conspiracy to jointly exercise monopoly power is not a cognizable theory
 5 under Section 2 of the Sherman Act. Rather, Section 2 prohibits only
 6 monopolization by a *single entity*. Thus, Plaintiff's claim that UTA has conspired
 7 with its three largest competitors to "share" monopoly power is not only
 8 implausible, but is based on a theory not recognized as an offense under Section 2.
 9 *See Section IV.A.1, infra.*

10 Finally, Plaintiff's FAC also fails to allege material facts that constitute
 11 another required element of any Section 2 offense—"antitrust injury," that is, injury
 12 of the type the antitrust laws were designed to prevent. *Brunswick Corp. v. Pueblo*
 13 *Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). A basic and long-held tenet of
 14 antitrust law is that the Sherman Act protects competition, not competitors. As
 15 Plaintiff's own allegations concede, the packaging arrangements offered by agencies
 16 like UTA and ICM actually *benefit* consumers of talent agencies' services, reducing
 17 (in many cases to zero) the commissions traditionally paid by talent to agencies by
 18 shifting these fees to studios and production companies. If Plaintiff cannot compete,
 19 that disability is not caused by any anticompetitive behavior, but by its own inability
 20 to put together competitive packaging deals by reason of the fact that, as a
 21 "boutique" agency with only a few clients, it lacks the breadth and depth of a talent
 22 roster to do so. But, it is well-settled that it is not the function of the antitrust laws
 23 to level the playing field between small competitors and larger ones. And, injury
 24 due to a competitor's lower prices is not the type of injury the antitrust laws were
 25 designed to prevent. *Id.*; *see Section IV.A.3, infra.*

26 For each of these reasons, UTA submits that Plaintiff's antitrust claim should
 27 be dismissed. And, since these defects could never be remedied by repleading, the
 28 dismissal should be without leave to amend. If, upon dismissal of the antitrust

1 claim—the sole basis for federal jurisdiction—the Court decides to exercise its
 2 discretion to consider the FAC’s state law causes of action, these should be
 3 dismissed as well. As explained below, *see* Sections IV.B-E, *infra*, Plaintiff’s state
 4 law claims for tortious interference with contract and tortious interference with
 5 prospective economic advantage are both facially defective. So too are the claims
 6 for breach of Section 17200 of the California Business and Professions Code (the
 7 “UCL claim”) and declaratory relief. Finally, the Sixth Cause of Action for an
 8 injunction is not even a cognizable legal claim, but merely a theory of relief and
 9 should likewise be dismissed.

10 **II. THE RELEVANT ALLEGATIONS OF THE FAC**

11 Much of Plaintiff’s prolix FAC consists of irrelevant allegations relating to
 12 the history of the talent industry, from the 1930s to the present decade. Insofar,
 13 however, that Plaintiff’s allegations are relevant to the antitrust and state law claims
 14 alleged against Defendant UTA, they are summarized below.

15 The thrust of Plaintiff’s FAC relates to “packaging” arrangements offered to
 16 talent by larger agencies, such as UTA and ICM. Under such arrangements,
 17 Lenhoff alleges, clients are not required to pay their agency the ten percent
 18 commission typically charged by smaller agencies, such as Plaintiff. [FAC ¶¶ 82-](#)
[83](#). Instead, Lenhoff alleges, UTA and the other so-called “Uber Agencies” seek to
 19 earn “packaging fees” from studios or production companies based on percentages
 20 of a television show’s revenues, rather than commissions from their clients. [See id.](#)
[¶ 24](#). Plaintiff alleges repeatedly that the packaging arrangements offered by UTA
 21 and other large agencies allow those agencies “to compete unfairly with smaller
 22 [a]gencies for talent,” as packaging opportunities are “effectively[] unavailable” to
 23 smaller agencies. [Id. ¶¶ 28, 83](#). Plaintiff further alleges that, as a result of this
 24 “unfair competition,” the largest agencies have “grown and consolidated their
 25 control.” [Id.](#)
 26
 27
 28

1 As a result of this consolidation, and the packaging opportunities UTA, ICM,
 2 CAA, and WME are able to offer talent, Plaintiff alleges, those four agencies have
 3 monopolized the relevant market for scripted series television. In particular,
 4 Plaintiff alleges that the four “Uber Agencies” together control 79% of “the
 5 2014/2015 scripted series staffing market,” 91% of “the 2014/2015 scripted series
 6 term deal market,” and 93% of the “scripted series packaging market.” *Id.* ¶¶ 71-
 7 73. Insofar as UTA is concerned, however, UTA’s market shares are 22% of “the
 8 2014/2015 scripted series staffing market,” 23% of “the 2014/2015 scripted series
 9 term deal market,” and 18% of the “scripted series packaging market” according to
 10 the FAC. *See* FAC Exhs. C, F, H.

11 The particular impetus for Lenhoff’s lawsuit against UTA appears to be
 12 Plaintiff’s claim that UTA has taken one of Plaintiff’s clients. Plaintiff alleges that,
 13 between 2012 and 2014, UTA made “numerous calls” to Plaintiff’s clients, refused
 14 to stop those calls when asked to do so by Plaintiff and its counsel, and, as a result,
 15 “disrupted” Plaintiff’s relationships with its clients. *Id.* ¶ 20. In particular, Plaintiff
 16 asserts that UTA’s “poaching” activities disrupted Plaintiff’s relationship with one
 17 client, a “diversity director, producer, and DGA unit production manager” identified
 18 only as “Client #1.” *Id.* ¶¶ 21-24.

19 Plaintiff alleges that on or about November 4, 2014, Client #1 informed
 20 Plaintiff “that she no longer wished to be represented by Plaintiff.” *Id.* ¶ 21. On or
 21 about December 1, 2014, Plaintiff alleges, it learned that the Directors’ Guild
 22 website listed Plaintiff’s former client’s agent as an individual employed by UTA.
 23 *Id.* ¶ 23. On information and belief, Plaintiff alleges that Client #1 was “induced” to
 24 sever her contract with Plaintiff by UTA’s representation that she would be part of
 25 UTA’s “[p]ackaging activities.” *Id.* ¶ 24.

26 Based on these allegations, Plaintiff’s First Amended Complaint asserts six
 27 claims against UTA and ICM: (1) violations of Section 2 of the Sherman Act; (2)
 28 unlawful and unfair business practices, in violation of Section 17200 of the

1 California Business and Professions Code; (3) intentional interference with contract;
2 (4) intentional interference with prospective economic advantage;(5) declaratory
3 relief; and (6) injunctive relief.

4 **III. APPLICABLE LEGAL STANDARDS FOR MOTIONS TO DISMISS**

5 “[O]nly a complaint that states a plausible claim for relief survives a motion
6 to dismiss.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). To pass muster under
7 Federal Rule of Civil Procedure 12(b)(6), a complaint must contain sufficient factual
8 matter, accepted as true, to state a claim to relief that is plausible on its face. *Id. at*
9 *678*. Conclusory statements, or a “formulaic recitation of the elements of a cause of
10 action,” will not suffice. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A
11 complaint must allege sufficient facts to cross “the line between possibility and
12 plausibility of entitlement to relief.” *Id. at 557*. Notably, while the general rule for
13 motions brought under Federal Rule 12(b)(6) is that allegations of material fact in a
14 complaint are assumed to be true, the Court is “not required to accept legal
15 conclusions cast in the form of factual allegations if those conclusions cannot
16 reasonably be drawn from the facts alleged.” *Clegg v. Cult Awareness Network*, 18
17 F.3d 752, 754-55 (9th Cir. 1994). That observation is particularly apt here, where
18 the FAC is littered with conclusory allegations using antitrust nomenclature such as
19 “antitrust injury,” “predatory pricing,” and the like, without any facts supporting
20 those legal conclusions.

21 Federal Rule of Civil Procedure 9(b) mandates that “the circumstances
22 constituting fraud or mistake” shall be stated with “particularity.” Fed. R. Civ. P.
23 9(b). The requirements of Rule 9(b) apply to both federal and state law claims,
24 including state law claims for alleged violations of the UCL where such claims are
25 based on allegations of fraudulent conduct. *Kearns v. Ford Motor Co.*, 567 F.3d
26 1120, 1125 (9th Cir. 2009); *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103-04
27 (9th Cir. 2003); *Rahman v. Mott’s LLP*, No. CV 13-3482 SI, 2014 WL 325241, at
28 *8 (N.D. Cal. Jan. 29, 2014) (“The Ninth Circuit has specifically held that Rule

1 9(b)'s heightened pleading standard applies to claims for violation of the UCL, FAL
2 or CLRA that are grounded in fraud.”).

3 **IV. ARGUMENT**

4 As set forth below, Plaintiff has not and cannot state a viable claim for relief
5 under Section 2 of the Sherman Antitrust Act.¹

6 **A. Plaintiff's First Cause of Action for Violations of § 2 of the**
Sherman Act Should Be Dismissed Without Leave to Amend.

7 In its First Cause of Action, Plaintiff asserts that UTA and ICM have
8 “attempted to combine or conspire with other entities” to monopolize trade or
9 commerce in violation of Section 2 of the Sherman Act, which prohibits
10 monopolization, attempted monopolization, or conspiracy to monopolize “any part
11 of the trade or commerce.” See [FAC ¶ 118](#).

12 The FAC is ambiguous as to the precise nature of the Section 2 violation
13 being alleged in the First Cause of Action. That is, it is unclear whether Plaintiff is
14 alleging a claim for conspiracy to monopolize or for attempted monopolization.²
15 Either way, the FAC’s opaqueness does not affect the disposition of this motion.
16 Simply put, as a matter of law, Plaintiff has not alleged—and cannot allege—a
17 cognizable claim for relief under either theory. First, insofar as Plaintiff is
18 attempting to assert a claim for conspiracy to monopolize among UTA, ICM, and
19 the other pejoratively labeled “Uber Agencies,” CAA and WME, that claim fails
20 because Plaintiff has failed to allege that UTA, ICM, or any other party has
21 conspired to convey monopoly power *to a single entity*, as is required for a
22

23

24 ¹ As explained below, as a result, Plaintiff’s claims for violations of Section
25 17200 of the Business and Professions Code and for tortious interference with
prospective economic advantage, both of which are predicated on Plaintiff’s
26 defective Sherman Act claim, also fail.

27 ² It does not appear that the FAC accuses UTA of actual monopolization, nor
28 could it ever do so with the degree of plausibility required to survive a motion to
dismiss under the *Iqbal* standard given the allegation that UTA at most has a
23% market share.

1 conspiracy claim under Section 2. Indeed, Plaintiff's own allegations make
2 abundantly clear that the business practices of UTA, ICM, and others have fostered
3 vigorous and robust competition among talent agencies, particularly among the four
4 so-called "Uber Agencies."

5 Second, to the extent that Plaintiff is purporting to assert an attempted
6 monopolization claim, that claim is facially and fatally infirm because the matters
7 that Plaintiff *has* alleged undermine the possibility of proving that UTA (or ICM for
8 that matter) has achieved or has any realistic prospect of achieving a "dangerous
9 probability of monopoly power," an essential element of an attempted
10 monopolization claim. Finally, whether Plaintiff is asserting a conspiracy to
11 monopolize or an attempt claim under Section 2, the FAC fails to allege facts
12 sufficient to establish "antitrust injury," another requisite element of any claim
13 under the Sherman Act. Each of these deficiencies is addressed in turn below.

14 1. Plaintiff Has Not Adequately Alleged a Conspiracy to Monopolize.

15 Fairly construed in light of the persistent references to the combined market
16 shares of the so-called "Uber Agencies" that permeate the FAC, it appears that
17 Plaintiff's primary antitrust theory is that UTA and the other "Uber Agencies" have
18 conspired to monopolize the market for scripted television series. To state an
19 actionable claim for conspiracy to monopolize under Section 2 of the Sherman Act,
20 a plaintiff must allege: (1) the existence of a combination or conspiracy to
21 monopolize; (2) an overt act in furtherance of the conspiracy; (3) the specific intent
22 to monopolize; and (4) causal antitrust injury. *Paladin Assoc., Inc. v. Montana*
23 *Power Co.*, 328 F.3d 1145, 1158 (9th Cir. 2003).

24 But, Plaintiff's "conspiracy to monopolize" claim in the FAC fails for the
25 simple reason that Plaintiff has not pled, and cannot plead, the existence of any
26 combination or conspiracy to provide *one single entity* with monopoly power.
27 While Plaintiff repeatedly alleges that the four so-called "Uber Agencies" *share*
28 monopoly power, antitrust law recognizes no such theory. And, nowhere does

1 Plaintiff allege that UTA (or ICM) has conspired with any other party to provide a
2 single entity—*one* of the four “Uber Agencies”—with monopoly power. Nor could
3 Plaintiff ever do so under the “plausibility” test of *Twombly* and *Iqbal*; there is no
4 credible circumstance in which UTA or any one of the other so-called “Uber
5 Agencies” would agree to confer monopoly power on one of its direct competitors.

6 “To pose a threat of monopolization, one firm *alone* must have the power to
7 control market output and exclude competition.” *Rebel Oil Co. v. Atl. Richfield Co.,*
8 51 F.3d 1421, 1443 (9th Cir. 1995) (emphasis in original). As the U.S. District
9 Court for the District of Columbia has explained:

10 The very phrase “shared monopoly” is paradoxical; when
11 a small number of large sellers dominates a market, this
12 typically is described as an oligopoly. In enacting the
13 prohibitions on monopolies, Congress was concerned
about the “the complete domination of a market by a
single economic entity,” and therefore did not include
“shared monopolies” or oligopolies within the purview of
Section 2.

14 *Oxbow Carbon & Minerals LLC v. Union Pac. R.R. Co.*, 926 F. Supp. 2d 36, 46
15 (D.D.C. 2013) (emphasis in original). Thus, even accepting all of Plaintiff’s
16 allegations as true—to wit, that the so-called “Uber Agencies” have conspired to
17 share market power among them—Plaintiff has failed to allege conduct that violates
18 Section 2 of the Sherman Act. As the court in *Oxbow Carbon* explained,
19 “*competitors*, by conspiring to maintain or create an oligopoly, do not run afoul of
20 the Section 2 prohibitions against monopoly.” *Id.* (emphasis in original).

21 Courts have, therefore, repeatedly dismissed Section 2 claims based on a
22 “shared monopoly” theory. See, e.g., *Int’l Longshore and Warehouse Union v.*
23 *ICTSI Oregon, Inc.*, 15 F. Supp. 3d 1075, 1096-97 (D. Ore. 2014) (dismissing
24 Section 2 claim where plaintiff had failed to allege a conspiracy to create a
25 monopoly for any *single* entity); *Terminalift LLC v. Int’l Longshore & Warehouse*
26 *Union Local 29, No. 11-CV-1999, 2013 WL 2154793, at *4 (S.D. Cal. May 17,*
27 *2013)* (“Because PMA members compete against each other, the alleged conspiracy

1 would create a ‘shared monopoly’ or oligopoly. Such conduct is not a violation of
2 section 2.”); *Standfacts Credit Servs., Inc. v. Experian Information Solutions, Inc.*,
3 [405 F. Supp. 2d 1141, 1152 \(C.D. Cal. 2005\)](#) (dismissing conspiracy to monopolize
4 claim where plaintiffs “fail[ed] to allege a specific intent by Defendants to empower
5 one of them with monopoly power”).

6 Accordingly, even accepting all of Plaintiff’s allegations as true, Plaintiff has
7 alleged, at most, a conspiracy to create an oligopoly consisting of four large talent
8 agencies. Plaintiff thus has not alleged a conspiracy to commit any action in
9 violation of Section 2 of the Sherman Act, and its antitrust claim should be
10 dismissed.

11 2. Plaintiff Has Not Pled Sufficient Market Share to Assert an
12 Attempted Monopolization Claim.

13 Giving Plaintiff the benefit of all doubt, it is possible, though unlikely, that
14 instead of a conspiracy to monopolize, Plaintiff is attempting to plead a claim under
15 the alternative Section 2 theory of “attempted monopolization.” That claim,
16 however, fares no better than the conspiracy to monopolize claim.

17 To state a claim for attempted monopolization, a plaintiff must allege four
18 elements: (1) a specific intent to control prices or destroy competition; (2) predatory
19 or anticompetitive conduct directed at accomplishing that purpose; (3) a dangerous
20 probability of achieving “monopoly power”; and (4) causal antitrust injury. *See*
21 [Rebel Oil, 51 F.3d at 1434](#). In this instance, in addition to failing to plead antitrust
22 injury for the reasons set forth below (*see* Section IV.A.3, *infra*), Plaintiff has not
23 pled, and cannot plead, that there exists a dangerous probability that UTA could
24 achieve monopoly power.

25 As the Ninth Circuit explained in *Rebel Oil*, in the context of attempted
26 monopolization claims, “a market share of 30 percent is presumptively insufficient
27 to establish the power to control price.” [Rebel Oil, 51 F.3d at 1438](#) (internal citation
28 omitted).

1 Here, Plaintiff appears to assert that there are three relevant markets: a market
2 for “scripted series staffing,” a market for “scripted series term deals,” and a market
3 for “packaged scripted shows.” *See FAC ¶¶ 71-73.*³ While Plaintiff asserts that the
4 four so-called “Uber Agencies” *together* control large percentages of each relevant
5 market, the four agencies’ aggregated market shares are not relevant here. While
6 “[t]he aggregation of market shares of several rivals is justified if the rivals are
7 alleged to have conspired to monopolize,” *Rebel Oil*, 51 F.3d at 1437, as set forth in
8 Section IV.A.1 above, Plaintiff has not alleged a conspiracy to provide any single
9 entity with monopoly power. Thus, only the market shares of the individual
10 defendants in this case are relevant.

11 Critically, although Plaintiff has gone to considerable effort to measure
12 UTA’s market share in these three putative markets, the market shares of UTA
13 alleged by Plaintiff to not approach the requisite threshold for a cognizable
14 attempted monopolization claim. UTA’s (and ICM’s) market shares, as alleged by
15 Plaintiff, are as follows:

| | UTA Alleged Market Share | ICM Alleged Market Share |
|---------------------------|---------------------------------|---------------------------------|
| Scripted Series Staffing | 22% | 10% |
| Scripted Series Term Deal | 23% | 10% |
| Packaged Scripted Series | 18% | 8% |

26
27 ³ In reality, Plaintiff has more likely alleged a single market for “scripted
28 series television” and three different measures of market share. This is, of course,
but one of the problems with Plaintiffs’ market allegations, but we take Plaintiff’s
allegations as true for purposes of this motion.

1 FAC Exhs. C, F, H. Moreover, nothing in Plaintiff's allegations suggests that UTA,
2 ICM, or any other talent agency has any dangerous probability of achieving
3 monopoly power. Indeed, the exhibits to Plaintiff's complaints show that, while
4 competition among talent agencies may have consolidated over time, competition
5 remains robust, with no single firm controlling more than 34% of any of Plaintiff's
6 asserted markets. *See* FAC Exhs. A-J.

7 Given these market shares, Plaintiff cannot state a plausible claim for
8 attempted monopolization against UTA. *See, e.g., ChriMar Sys., Inc. v. Cisco Sys.,*
9 *Inc., 72 F. Supp. 3d 1012, 1019 (N.D. Cal. 2014)* (granting motion to dismiss
10 attempted monopolization counterclaim where defendant had failed to allege
11 sufficient market power). There are no allegations in the FAC that would suggest
12 that UTA itself has the power to control output or increase prices to talent, or that
13 there otherwise exists a dangerous probability that the insufficient market shares
14 attributed to UTA in the pleading could rise to comprise market power. To the
15 contrary, the FAC identifies several strong competitors to UTA among the "Uber
16 Agencies," two of which—CAA and WME—have even larger market shares than
17 UTA. The FAC makes absolutely no claim, nor could it, that if UTA determined to
18 raise its prices to talent in the entertainment industry, talent could not depart UTA
19 and sign with its larger (or, for that matter, smaller) rivals. Nothing in the FAC
20 alleges that that there is anything intrinsic to the "scripted series television" market
21 preventing clients from moving from agency to agency, or that UTA's rivals, ICM,
22 WME, or CAA, are capacity constrained and could not and would not readily
23 provide services to UTA's clients if the opportunity presented itself.

24 Accordingly, as a matter of law, Plaintiff has not stated and cannot state a
25 claim against UTA for attempted monopolization in violation of § 2 of the Sherman
26 Act.

27
28

1 3. Plaintiff Has Not Adequately Pled Causal Antitrust Injury.

2 Regardless of what variant of claim Plaintiff is attempting to assert under
3 Section 2, Plaintiff's claim should be dismissed for failure to adequately plead the
4 required element of "antitrust injury," defined as "injury of the type the antitrust
5 laws were intended to prevent and that flows from that which makes the defendants'
6 acts unlawful." *Brunswick, 429 U.S. at 489; Glen Holly Entertainment, Inc. v.*
7 *Tektronix, Inc., 352 F.3d 367, 372 (9th Cir. 2003)*. Causal antitrust injury "is an
8 element of all antitrust suits brought by private parties." *Rebel Oil, 51 F.3d at 1433*.
9 Antitrust injury involves harm to the process of competition and to consumer
10 welfare, and not harm to individual competitors. *See* *Cascade Health Solutions v.*
11 *PeaceHealth, 515 F.3d 883, 901 (9th Cir. 2008)*. "[I]t is inimical to the antitrust
12 laws to award damages for losses stemming from acts that do not hurt competition."
13 *Rebel Oil, 51 F.3d at 1433* (citing *Atl. Richfield Co. v. USA Petroleum, Inc., 495*
14 *U.S. 328, 334 (1990)*). There can be no antitrust injury where the conduct at issue is
15 "beneficial or neutral to competition." *Id.*

16 That is the case here. Plaintiff's antitrust claim is based on its repeated
17 assertions that the packaging deals offered by UTA and other large agencies
18 foreclose smaller agencies, like Plaintiff, from competing effectively in the
19 marketplace. *See, e.g.*, *FAC ¶ 28*. But the antitrust laws serve to protect vigorous
20 competition and consumer welfare, and not to protect individual competitors. As
21 the Ninth Circuit explained in *Rebel Oil*:

22 Of course, conduct that eliminates rivals reduces
23 competition. But reduction of competition does not
24 invoke the Sherman Act until it harms consumer welfare.
25 Consumer welfare is maximized when economic resources
26 are allocated to their best use, and when consumers are
27 assured competitive price and quality. Accordingly, an act
28 is deemed *anticompetitive* under the Sherman Act only
when it harms both allocative efficiency *and* raises the
prices of goods above competitive levels or diminishes
their quality.

Rebel Oil, 51 F.3d at 1433 (internal citations omitted) (emphasis in original).

1 Here, even accepting all of Plaintiff's allegations as true, it is clear that
2 consumers of Plaintiff's services—talent seeking representation in the scripted
3 television series market—can actually benefit from the “packaging” practices at
4 issue in Plaintiff's First Amended Complaint. Indeed, *Plaintiff itself alleges* that
5 under the “packaging” arrangements at issue, talent can forgo paying the traditional
6 commission of ten percent typically paid to smaller agencies, because UTA looks to
7 earn its “packaging fee” from fees paid by the “studios/production companies.”
8 FAC ¶ 24. As stated in the FAC: “In other words, Plaintiff alleges, the smaller
9 Agencies, who charge ten percent (10%), are undercut by the largest Agencies,
10 including UTA and ICM, who can offer to charge the prospective television client
11 *zero.*” FAC ¶ 83. Likewise, when describing what may be Plaintiff's true gripe –
12 that UTA signed a specific producer who was formerly a client of Plaintiff's (i.e.,
13 “Client #1”), Plaintiff avers that “. . . as with Client #1, a major inducement by the
14 large Agency . . . was the promise of packaging on other projects and, therefore, the
15 nonpayment of commissions by the client.” FAC ¶ 27.

16 However, injury flowing from a firm's inability to compete with its
17 competitor's lower prices, or other advantageous benefits, is not injury flowing from
18 anticompetitive behavior, or, in the parlance of antitrust law, “injury of the type the
19 antitrust laws were designed to prevent.” If Plaintiff has suffered business losses
20 because, with only a few clients, it cannot compete with the larger agencies and their
21 ability to “package” and forgo a 10% commission because they have more extensive
22 talent rosters, that is not cognizable antitrust injury as a matter of law. Pool Water
23 Prod. v. Olin Corp., 528 F.3d 1024,1035 (9th Cir. 2001) (“The Supreme Court has
24 made clear, however, that a decrease in profits from a reduction in a competitor's
25 prices, so long as the prices are not predatory, is not an antitrust injury.”)⁴ Nor is
26

27

⁴ On several occasions in the FAC, Plaintiff conclusorily accuses UTA and
28 ICM of “predatory pricing,” by reason of their offering packaging opportunities to
their clients. But there are no specific factual allegations supporting this
conclusory label – i.e., that UTA or ICM are pricing their services below an

1 this circumstance unique: smaller stationary stores frequently have difficulty
2 competing with Staples or Office Depot; small hardware stores often cannot match
3 the lower prices of Lowe's or Home Depot. But, antitrust law does not provide a
4 remedy. To hold otherwise would stand antitrust law on its head and make it the
5 vehicle to protect competitors, not competition.⁵

6 In sum, Plaintiff has not alleged, and cannot allege, that UTA's packaging
7 practices have raised the price of goods above competitive levels or diminished their
8 quality, as required under the antitrust laws. *See Rebel Oil, 51 F.3d at 1433.*

9 Indeed, the opposite is true – Plaintiff complains of UTA's *lower* prices.
10 Accordingly, Plaintiff's first claim for relief should be dismissed on the additional
11 ground that Plaintiff has failed to allege antitrust injury. *See, e.g., LiveUniverse, Inc.*
12 *v. MySpace, Inc., 304 Fed. App'x 554, 557 (9th Cir. 2008)* (affirming dismissal of
13 antitrust claim based on failure to adequately allege antitrust injury).⁶

14

15 appropriate measure of their costs (*see, e.g., Brooke Group Ltd. v. Brown &*
16 *Williamson Tobacco Corp., 509 U.S. 209 (1993)*). Indeed, the FAC alleges the
17 opposite – to wit, that UTA and ICM have, by using packaging deals, shifted the
18 costs of commissions from talent to studios and production companies in the form of
19 license fees. [FAC ¶ 24](#).

20 ⁵ Beyond a stray and conclusory allegation that "Plaintiff offers the same, or
21 higher, quality individual Agency representation experience per commission dollar
22 paid as UTA or ICM do," [FAC ¶ 95](#), Plaintiff does *not* allege that the "packaging"
23 deals and representation provided by UTA and other agencies are in any way lower
24 in quality than those offered by smaller agencies. Nor does or could Plaintiff
25 plausibly allege UTA's packaging deals have affected output in the television
26 business, given the multiplicity of offerings in today's television market. Indeed, if
27 anything, the statistics proffered by Plaintiff in the FAC show that output has
28 increased with the advent of packaging deals. *Compare, e.g., FA Exhs. E and F*
showing 373 scripted term deals in 2001-02 and 393 scripted term deals in 2014-15.
Finally, Plaintiff cites no facts to support its conclusory assertions that Defendants'
conduct has made it more difficult for talent to find representation. Plaintiff itself
alleges that the number of licensed talent agencies has actually grown in the last
decade. [FAC ¶ 71](#).

29 ⁶ While Plaintiff makes repeated references to inflammatory and irrelevant
30 statistics regarding the "lack of diversity and creativity" in television programming,
see, e.g., FAC ¶ 30, these are not injuries of the type the antitrust laws were intended
to prevent, nor otherwise the concern of antitrust law. The Court should ignore
Plaintiff's efforts to bias the antitrust inquiry with irrelevant and unproven
accusations about diversity that have no bearing on the possible presence of a
Section 2 violation.

1 4. Leave to Amend Should Not Be Granted.

2 As set forth above, Plaintiff's antitrust claim suffers from numerous,
3 independent fatal infirmities.⁷ Those flaws are fundamental to the claims and
4 cannot be remedied by an amendment. Accordingly, Plaintiff's antitrust claim
5 should be dismissed with prejudice and without leave to amend. *See Streamcast*
6 *Networks, Inc. v. Skype Techs., S.A.*, 547 F. Supp. 2d 1086, 1098 (C.D. Cal. 2007)
7 (dismissing antitrust claims with prejudice where conduct at issue "did not have any
8 adverse effects on competition or innovation," and "[n]o additional pleading or
9 discovery [would] alter this reality").

10 B. Plaintiff's Third Cause of Action for Intentional Interference with
11 Contract Should Be Dismissed.

12 Plaintiff's allegations within the Third Cause of Action for Intentional
13 Interference with Contract are devoid of specific facts concerning the alleged
14 contract that forms the basis for intentional interference. As a result of this glaring
15 deficiency, the cause of action is not properly pleaded.

16 To state a cause of action for intentional interference with contract, Plaintiff
17 must allege facts sufficient to establish the following elements: (1) a valid contract
18 between plaintiff and a third party; (2) defendant's knowledge of this contract; (3)
19 defendant's intentional acts designed to induce a breach or disruption of the
20 contractual relationship; (4) actual breach or disruption of the contractual
21 relationship; and (5) resulting damage. *Pac. Gas & Elec. Co. v. Bear Stearns & Co.*,
22 *50 Cal.3d 1118, 1126 (1990); Savage v. Pac. Gas & Elec. Co.*, 21 Cal. App. 4th 434,
23 *448 (1993)*.

24

25 ⁷ In addition to the fatal defects in Plaintiff's antitrust pleading outlined
26 above, for the reasons outlined in Section C of Defendant ICM's Memorandum of
27 Point and Authorities in support of its Motion to Dismiss, which are equally
28 applicable to UTA (and which are incorporated by this reference but not repeated in
full to avoid duplication), Plaintiff has failed to adequately plead sufficient facts
defining the formation and operation of any conspiracy or any overt acts in
furtherance of such a conspiracy.

1 Within Plaintiff's FAC, Plaintiff alleges summarily only that Plaintiff and
2 Client #1 had a valid, exclusive contract and that Defendant UTA had knowledge of
3 the contract, had been given notice of Plaintiff's complete exclusive client list, and
4 had unabated access to Plaintiff's complete exclusive client list. [FAC ¶¶ 128-129](#).
5 Other than a passing statement in the FAC alleging that Client #1 "had been signed
6 with Plaintiff for approximately four (4) years," [FAC ¶ 21](#), Plaintiff does not allege
7 anything beyond conclusory statements regarding the alleged, critical contract upon
8 which this cause of action rests.

9 In fact, Plaintiff alleges insufficient facts to establish a valid contract between
10 Plaintiff and Client #1, giving rise to a sustainable cause of action for intentional
11 interference with contract. Plaintiff does not allege whether the contract was oral or
12 written, the particular terms of the contract, whether it was terminable by any party
13 or with the passage of time, or other necessary components of a valid contract.
14 Moreover, Plaintiff alleges insufficient facts to establish that Defendant UTA
15 possessed the requisite knowledge of the contract between Plaintiff and Client #1, as
16 required under the elements for a cause of action of intentional interference with
17 contract.

18 Additionally, according to Plaintiff's allegations, Client #1 freely terminated
19 her contract with Plaintiff when she simply "informed Plaintiff that she no longer
20 wished to be represented by Plaintiff." [FAC ¶¶ 21-22](#). Hence, Client #1 was not
21 contractually bound to representation by Plaintiff at the time. Since Plaintiff does
22 not assert Client #1's termination constituted a breach of contract or interference
23 with an enforceable contractual relationship, Plaintiff fails to allege a viable
24 interference with contract claim.

25 Plaintiff's Third Cause of Action does not meet the pleading standard under
26 Federal Rule of Civil Procedure 8, as it does not give Defendant UTA sufficient
27 notice of what the claim is and the grounds upon which it rests. [*Neizil v Williams*](#),

1 [543 F. Supp. 899 \(M.D. Fla. 1982\)](#). Accordingly, the Third Cause of Action should
2 be dismissed.

3 **C. Plaintiff's Fourth Claim for Intentional Interference with**
4 **Prospective Economic Advantage Should Be Dismissed.**

5 In its fourth claim, Plaintiff alleges intentional interference with prospective
6 economic advantage against Defendants. The deficiencies with Plaintiff's first
7 claim under the Sherman Act render this cause of action equally meritless.
8 Intentional interference with prospective economic advantage is not properly pled
9 without an underlying and independent wrongful act. Plaintiff's reliance on the
10 defective Sherman Act violation as the purported wrongful act by definition renders
11 defective its allegation of intentional interference with prospective economic
12 advantage.

13 A plaintiff seeking to recover for an alleged interference with prospective
14 contractual or economic relations must plead and prove as part of its case-in-chief
15 that the defendant not only knowingly interfered with the plaintiff's expectancy, but
16 engaged in conduct that was wrongful by some legal measure other than the fact of
17 interference itself. [*Della Penna v. Toyota Motor Sales, U.S.A., Inc., 11 Cal. 4th 376,*](#)
18 [*393 \(1995\); see also Lemmer v. Charney, 195 Cal. App. 4th 99 \(2011\).*](#) In fact, in a
19 claim for intentional interference with prospective economic advantage, a defendant
20 must have engaged in intentionally wrongful acts designed to disrupt a plaintiff's
21 relationship. That requires a plaintiff to plead (1) that the defendant engaged in an
22 independently wrongful act, and (2) that the defendant acted either with the desire to
23 interfere or the knowledge that interference was certain or substantially certain to
24 occur as a result of its action. [*Korea Supply Co. v. Lockheed Martin Corp., 29 Cal.*](#)
25 [*4th 1134, 1164-1165 \(2003\).*](#) An act is independently wrongful if it is unlawful,
26 which means that it must be conduct proscribed by some constitutional, statutory,
27 regulatory, common law, or other determinable legal standard. [*Id.*](#) at 1159.

28

1 In the present action, at Paragraph 138 of the FAC, Plaintiff alleges that
2 “Defendants engaged in wrongful acts through its unlawful, unfair, and predatory
3 practices in violation of the Sherman Act, as more fully set forth above.” No doubt
4 this simple and conclusory allegation is meant to meet the above requirement for
5 pleading interference with prospective economic advantage with the commission of
6 an independent and wrongful act. However, since Plaintiff’s first cause of action for
7 a Sherman Act violation lacks legal merit for the reasons set forth above, its fourth
8 cause of action for intentional interference with prospective economic advantage
9 must fail for the same reasons.

10 **D. Plaintiff’s Second Claim for Violation of Section 17200 Should Be**
11 **Dismissed.**

12 Plaintiff also alleges claims under Section 17200 of the California Business
13 and Professions Code, known as California’s Unfair Competition Law (“UCL”).
14 “Because Business and Professions Code section 17200 is written in the disjunctive,
15 it established three varieties of unfair competition – acts or practices which are
16 unlawful, or unfair, or fraudulent.” Podolsky v. First Healthcare Corp., 50 Cal.
17 App. 4th 632, 647 (1996). Plaintiff’s claims fail under the unlawful and unfair
18 prongs of the UCL - the only prongs applicable to this action.

19 1. Plaintiff’s “Unlawful” and “Unfair” Claims Fail.

20 “The unlawful prong of the UCL ‘borrows violations of other laws and treats
21 them as unlawful practices,’ which the UCL then ‘makes independently
22 actionable.’” Elias v. Hewlett-Packard Co., 903 F. Supp. 2d 843, 858 (N.D. Cal.
23 2012). If the predicate legal claim supporting a violation of the unlawful prong of
24 the UCL fails, the UCL claim fails as well. Stearns v. Select Comfort Retail Corp.,
25 No. 08-2746 JF, 2009 WL 1635931, *16 (N.D. Cal. June 5, 2009) (dismissing
26 unlawful prong claim because the underlying statutory violations were “subject to
27 dismissal”); Daugherty v. Am. Honda Motor Co., Inc., 144 Cal. App. 4th 824, 837
28 (2006) (holding that plaintiff “cannot state a violation of the UCL under the

1 ‘unlawful’ prong” because the court had rejected plaintiff’s claim that conduct at
2 issue was a violation of a predicate statute). Plaintiff alleges that Defendants’
3 conduct was unlawful because it violated the Sherman Act. [FAC ¶ 124](#). As
4 demonstrated above, Plaintiff fails to allege any such violations.

5 For the same reasons, the UCL claims fail under the unfair prong. In [Cel-](#)
6 [Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal.4th 163,](#)
7 [182 \(1999\)](#), it was held that courts may not simply impose their own notions of the
8 day as to what is fair or unfair. Plaintiff must show a tort, violation of a statute, or
9 some other recognized duty. [*Id.*](#)

10 Accordingly, Plaintiff’s unlawful prong and unfair prong UCL claims fail as a
11 matter of law.

12 2. Plaintiff’s Claims for Restitution and Disgorgement Fail.

13 The remedy for a UCL violation is either injunctive relief or restitution.
14 See Cal. Bus. & Prof. Code § 17203. “The restitutionary relief is limited to money
15 or property lost by the plaintiff and acquired by the defendant.” [Fresno Motors,](#)
16 [LLC v. Mercedes Benz USA, LLC, 771 F.3d 1119, 1135 \(9th Cir. 2014\)](#), citing
17 [Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 336 \(2011\)](#) (“Restitution under §
18 17203 is confined to restoration of any interest in money or property, real or
19 personal, which may have been *acquired* by means of such unfair competition.”)
20 (emphasis in original) (internal quotation marks omitted). Even where economic
21 injury caused by an unfair business practice involves a loss by the plaintiff, no
22 restitution is permitted without a corresponding gain by the defendant. [Fresno](#)
23 [Motors, 771 F.3d at 1135](#); see also [Palmer v. Stassinos, 348 F. Supp. 2d 1070,](#)
24 [1087-89 \(N.D. Cal. 2004\)](#) (UCL restitution claims dismissed where plaintiffs did not
25 show they had lost money or property, and could not rely on putative class to correct
26 said deficiency). Plaintiff has not adequately alleged Defendants obtained a
27 monetary gain that correlated with any pecuniary loss on its part. For this reason,
28 Plaintiff’s restitution claims must be dismissed.

1 Further, disgorgement is not a permissible remedy under the UCL. As the
2 California Supreme Court has explained, “This court has never approved of
3 nonrestitutionary disgorgement of profits as a remedy under the UCL.” Korea
4 Supply Co. v. Lockheed Martin Corp., 29 Cal.4th 1134, 1148 (2003). As Plaintiff’s
5 restitution remedy fails outright, there can be no independent disgorgement remedy
6 for the purported UCL violation. This claim must also be dismissed.

7 **E. Plaintiff’s Fifth and Sixth Causes of Action for Declaratory and**
8 **Injunctive Relief Should Also Be Dismissed.**

9 Plaintiff’s Fifth and Sixth Causes of Action, for declaratory and injunctive
10 relief, respectively, each fail because they are wholly based and dependent on
11 Plaintiff’s claims for violations of the Sherman Act and the UCL. Given that neither
12 of those claims can proceed for the reasons already discussed, Plaintiff is not
13 entitled to the requested relief. In addition, for the separate and additional reasons
14 below, these claims must be dismissed on other grounds.

15 It is well-settled that a claim for “injunctive relief,” standing alone, is not a
16 cause of action. *See, e.g., Jensen v. Quality Loan Serv. Corp.*, 702 F. Supp. 2d
17 1183, 1201 (E.D. Cal. 2010) (“A request for injunctive relief by itself does not state
18 a cause of action.”); *Henke v. Arco Midcon, L.L.C.*, 750 F. Supp. 2d 1052, 1059-60
19 (E.D. Mo. 2010) (“Injunctive relief, however, is a remedy, not an independent cause
20 of action.”); *Plan Pros, Inc. v. Zych*, No. 8:08CV125, 2009 WL 928867, at *2 (D.
21 Neb. Mar. 31, 2009) (stating that “no independent cause of action for injunction
22 exists”); *Motley v. Homecomings Fin., LLC*, 557 F. Supp. 2d 1005, 1014 (D. Minn.
23 2008) (same); *Camp v. Board of Supervisors*, 123 Cal. App. 3d 334, 356 (1981)
24 (“Injunctive relief is a remedy and not, in itself, a cause of action, and a cause of
25 action must exist before injunctive relief may be granted.”). Injunctive relief would
26 only be available if Plaintiff were entitled to such a remedy on its independent cause
27 of action for violation of the UCL. It is not, and this claim must be dismissed
28 outright.

1 The elements of a claim for declaratory relief are: (a) proper subject of
2 declaratory relief within the scope of California Code of Civil Procedure section
3 §1060 (relating to rights under written instruments, or rights in and over real
4 property or a watercourse channel); and (b) an actual controversy involving
5 justiciable questions relating to the rights or obligations of a party. *See Triburon v.*
6 *Northwestern Pac. Ry. Co., 4 Cal. App. 3d 160, 170 (1970)*. Specific pleading of an
7 actual controversy is necessary, and a plaintiff cannot establish the existence of an
8 actual, present controversy merely by pointing to the lawsuit in which he seeks
9 declaratory relief. *City of Cotati v. Cashman, 29 Cal. 4th 69, 79, 80 (2002)*. The
10 purpose of a declaratory relief action is to determine and declare rights and
11 obligations of the parties to the dispute. The claim functions prospectively, and is
12 not available to redress past wrongs. *Babb v. Superior Court, 3 Cal. 3d 841, 848*
13 *(1971)*. Declaratory relief is only suitable where there is an actual controversy, not
14 simply an abstract or academic dispute. *Connerly v. Schwarzenegger, 146 Cal. App.*
15 *4th 739, 746 (2007)*. The controversy has to be of a character which acknowledges
16 specific and definite relief by judgment within the field of judicial determination, as
17 distinguished from an advisory opinion upon a particular or hypothetical set of facts.
18 *Sanctity of Human Life Network v. Cal. Highway Patrol, 105 Cal. App. 4th 858, 872*
19 *(2003)*.

20 Plaintiff has not alleged sufficient facts showing an actual or justiciable
21 controversy. As Plaintiff has not attached any contracts, it is impossible for UTA to
22 ascertain what specific rights and obligations of the parties are being challenged by
23 Plaintiff. In addition, the claim fails as a matter of law because it would serve only
24 to determine the identical issues that must be resolved with respect to Plaintiff's
25 other claims. *See Cal. Ins. Guarantee Ass'n v. Superior Court, 231 Cal. App. 3d*
26 *1617, 1623-24 (1991)* (purpose of declaratory relief is not to furnish a litigant with a
27 second claim for the determination of identical issues); Cal. Code Civ. Proc. § 436.
28

1 Therefore, the FAC does not state viable claims for either declaratory or injunctive
2 relief, and these claims should be dismissed.

3 **V. CONCLUSION**

4 For the foregoing reasons, UTA respectfully requests that the Court dismiss
5 Plaintiff's First Cause of Action for violations of Section 2 of the Sherman Act,
6 without leave to amend. Should the Court exercise its discretion to adjudicate the
7 supplemental state law claims alleged in the Second through Sixth Causes of Action,
8 these claims, too, should be dismissed.

9
10 DATED: August 10, 2015

Respectfully submitted,

11 Bv: /s/ Steven A. Marenberg
12 IRELL & MANELLA LLP
13 Steven A. Marenberg (101033)
14 smarenberg@irell.com
15 Melissa Sedrish Rabbani (283993)
16 mrabbani@irell.com
17 1800 Avenue of the Stars, Suite 900
18 Los Angeles, California 90067-4276
19 Telephone: (310) 277-1010

20
21 FREEDMAN & TAITELMAN, LLP
22 Bryan J. Freedman (151990)
23 bfreedman@ftllp.com
24 David M. Marmorstein (192993)
25 dmarmorstein@ftllp.com
26 1901 Avenue of the Stars, Suite 500
27 Los Angeles, California 90067
28 Telephone: (310) 201-0005

29
30 *Attorneys for Defendant*
31 *United Talent Agency, LLC*

